

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUAN DAVILA-BAJANA,)	Civil Action No. 04-253E
)	
Plaintiff,)	Hon. Sean J. McLaughlin
)	United States District
v.)	Judge
)	
TIM HOLOHAN, <u>et al.</u> ,)	Hon. Susan Paradise Baxter
)	Chief United States Magistrate
Defendants.)	Judge
)	
)	ELECTRONICALLY FILED
)	

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION
FOR LEAVE TO AMEND COMPLAINT**

Plaintiff's Complaint was received by the Court in this case on or around September 8, 2004, and filed on or around January 12, 2005. See Docket Nos. 1, 6. On or around November 14, 2005, Defendants submitted a Motion to Dismiss and Memorandum of Law in Support, based upon two separate grounds: 1) failure to exhaust all available administrative remedies with respect to the Bivens action, and 2) failure to file the Federal Tort Claims Act (FTCA) action within the statutory period of time. See Docket Nos. 16-17.

Plaintiff now seeks leave to amend the Complaint in this case. The nature of Plaintiff's amendment is solely to add the United States as a Defendant for purposes of the FTCA action.

While Rule 15(a) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") generally allows the Court to freely grant leave to amend, Rule 15 does not allow an amendment where there has been undue delay, bad faith, undue prejudice, or where the

amendment would be futile. Fed. R. Civ. P. 15(a); Foman v. Davis, 371 U.S. 178, 182 (1962); Jablonski v. Pan American Worldwide Airways, Inc., 863 F. 2d 289, 292. (3rd Cir. 1988).

An amendment of the complaint is futile if, "the amendment would not cure the deficiency in the original complaint or if the amended complaint would not withstand a renewed motion to dismiss. Id.; see also, Massarsky v. General Motors Corp., 706 F. 2d 111, 125 (3rd Cir), cert. denied 464 U.S. 937 (1983).

In Jablonski, although the proposed amendment would have alleged a new theory of liability, the court denied the motion because the complaint would still be barred by the state's two-year statute of limitations. As such, amendment of the complaint was determined to be futile because "the amended complaint could not withstand a renewed motion for judgment on the pleadings." Jablonski, 863 F.2d at 292.

Similarly, in the present case, Defendants have moved to dismiss the FTCA portion of the Complaint because it was barred by the FTCA's statute of limitations, 28 U.S.C. § 2401(b). Even if Plaintiff were allowed to amend the Complaint, no amendment could cure this deficiency in the original Complaint, or render the Amended Complaint able to withstand a renewed motion to dismiss. As such, Plaintiff's Motion for Leave to Amend the Complaint should be denied as futile, and Plaintiff's original

FTCA claim must be dismissed because it is barred by the statute of limitations as fully brief in our motion to dismiss.

Respectfully submitted,

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Dated: March 1, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2006, I electronically filed and/or served by first-class U.S. mail a true and correct copy of **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT:**

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